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IN THE

SUPREME COURT OF THE UNITED STATES

October Term, 1968 No. 870

JAMES MICHAEL FORAN,

Appellant,

v.

JOHN WEINHOFF, ELMER RISSNER, WILLIAM RICE, FRANK JAKZEWSKI, and OTTO SCHNEIDER, Members of Milwaukee County Local Board 43, Selective Service System,

Appellees.

Appeal from the United States District Court for the Eastern District of Wisconsin

STATEMENT AS TO JURISDICTION

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STATEMENT AS TO JURISDICTION

The appellant, pursuant to United States Supreme Court Rules 13(2) and 15, files this his statement of the basis upon which it is contended that the Supreme Court of the United States has jurisdiction on a direct appeal to review the final decree in question and should exercise such jurisdiction in this case.

OPINION BELOW

The judgment of the United States District Court for the Eastern District of Wisconsin sitting as a three judge District Court pursuant to 28 U. S. C. sec. 2282 was entered on October 4, 1968, dismissing the plaintiff's cause of action upon the merits. A copy of the decision is set out in the Appendix at page 9.

JURISDICTION

This case was commenced by the filing of a complaint and application for the convening of a three judge District Court pursuant to 28 U. S. C. sec. 2282. In his complaint the plaintiff sought a declaratory judgment that 50 U. S. C. App. sec. 460(b)(3) is repugnant to the Constitution of the United States, an injunction enjoining the defendants from denying the plaintiff his right to judicial review of his selective service classification on the basis of said unconstitutional Act of Congress, and that the plaintiff's cause of action in Civil Case No. 68-C-15 be reinstated for a determination on the merits. Since this case fell within the provisions of 28 U. S. C. sec. 2282 a three judge District Court was requested and convened.

On October 4, 1968, the three judge court dismissed plaintiff's cause of action upon the merits and on October 22, 1968, a notice of appeal was filed on behalf of the plaintiff in the United States District Court for the Eastern District of Wisconsin.

This appeal is brought pursuant to 28 U. S. C. sec. 1253 and 28 U. S. C. sec. 2101(b).

The following decisions are believed to sustain the jurisdiction of the Supreme Court to review the judgment on direct appeal in this case. Radio Corp. of America v. United States, 341 U. S. 412; Jameson & Co. v. Morgenthau, 307 U. S. 171; California Water Service Co. v. Redding, 304 U. S. 252.

This suit involves the validity of an Act of Congress of the United States, specifically, 50 U. S. C. App. sec. 460 (b)(3) which provides in relevant part as follows:

> "No judicial review shall be made of the classification or processing of any registrant by local boards, appeal boards, or the President, except as a defense to a criminal prosecution instituted under section 12 of this title, after the registrant has responded either affirmatively or negatively to an order to report for induction, or for civilian work in the case of a registrant determined to be opposed to participation in war in any form; Provided, that such review shall go to the question of the jurisdiction herein reserved to local boards, appeal boards, and the President only when there is no basis in fact for the classification assigned to such registrant."

QUESTIONS PRESENTED

Is the denial of judicial review of a selective service classification pursuant to 50 U. S. C. App. sec. 460 (b)(3) repugnant to the Fifth Amendment of the Constitution of the United States as a denial of the plaintiff's due process rights?

STATEMENT OF THE CASE

The plaintiff herein has consistently requested exemption from the draft as a conscientious objector and the defendants herein, members of Milwaukee County Local Board 43, Selective Service System, have consistently denied all the plaintiff's requests to be so classified. The basis of the denial of conscientious objector status to the plaintiff stems from a letter dated September 22, 1967, to the Chairman, Appeal Board, Eastern District of Wisconsin Panel No. 1, Selective Service System, written by T. Oscar Smith, Chief, Conscientious Objector Section, Department of Justice, wherein the plaintiff believes that Mr. Smith misquoted and misconstrued the holding of this court in United States v. Seeger, 380 U. S. 163 (1965).

Plaintiff sought review of his selective service classification before the Federal District Court for the Eastern District of Wisconsin in Civil Case No. 68-C-15, naming as defendants in that case the members of Milwaukee County Local Board 43, Selective Service System, named as defendants herein. Relying on 50 U. S. C. App. sec. 460 (b)(3) the Honorable Robert E. Tehan, District Court Judge for the Eastern District of Wisconsin, dismissed Civil Case No. 68-C-15 on February 19, 1968.

Following this dismissal the plaintiff instituted the present action for a declaratory judgment that 50 U. S. C. App. sec. 460 (b)(3) is repugnant to the Constitution of the United States, an injunction enjoining the application or enforcement of said statute, and an order reinstating the plaintiff's cause

of action in Civil Case No. 68-C-15 for a determination on the merits. A three judge court under 28 U. S. C. sec. 2282 was requested and convened. After briefs and arguments the three judge court voted two to one to dismiss the plaintiff's cause of action upon the merits. On October 22, 1968, a notice of appeal was filed in the United States District Court for the Eastern District of Wisconsin from the order of the three judge court denying, after notice and hearing, the permanent injunction sought by the plaintiff. This appeal is taken pursuant to 28 U. S. C. sec. 1253 and 28 U. S. C. sec. 2101(b).

THE QUESTIONS PRESENTED ARE SUBSTANTIAL

The appellant contends that an Act of Congress which denies to the selective service registrant judicial review of his classification except as a defense to a criminal prosecution after the registrant has responded either affirmatively or negatively to an order to report for induction raises a substantial question under the Fifth Amendment to the Constitution of the United States.

Although on its face, the statute in question appears to provide judicial review to the plaintiff, a closer look reveals that such review is so ineffective as to amount to no review at all. This ineffective review denies to the plaintiff fundamental rights without the due process of law guaranteed to him by the Fifth Amendment. As Justice Douglas recognized in a 1946 case involving the operation of the selective service system, "We are dealing here with a question of personal liberty. A registrant who violates the Act commits a felony. A felon customarily suffers the loss of substantial rights." Estep v. United States,

327 U.S. 114 (1946) at pages 121-122.

Although Article III of the Constitution gives Congress the right to establish limitations upon the jurisdiction of the courts, appellant contends that such power of Congress is limited in such a way that a citizen may not be deprived of fundamental rights without due process of law.

Justice Murphy concurring in Estep v. United States, supra, quoting St. Joseph Stock Yards Co. v. United States, 298 U.S. 38 (1936) at page 52 stated, " 'Under our system there is no warrant for the view that the judicial power of a competent court can be circumscribed by any legislative arrangement designed to give effect to administrative action going beyond the limits of constitutional authority.' " at page 127.

50 U.S.C. App. sec. 460 (b)(3) does provide for some judicial review on its face, but such review is inadequate to satisfy the due process requirements of the Fifth Amendment. In Cotting v. Kansas City Stock Yards, 183 U.S. 79 (1901) at page 100, this court asks rhetorically,

> "Do the laws secure to an individual an equal protection when he is allowed to come into court and make his claim or defence subject to the condition that upon a failure to make good that claim or defence the penalty for such failure either appropriates all his property, or subjects him to extravagant and unreasonable loss?"

The court goes on later in the Cotting opinion, supra, as follows:

> "But when the legislature, in an effort to prevent any inquiry of the validity of a particular statute, so burdens any challenge thereof in the courts, that the party affected is necessarily constrained to submit rather than take the chances of the penalties imposed, then it becomes a serious question whether the party is not deprived of the equal protection of the laws." at page 102.

In the instant case the appellant has exhausted all of his administrative remedies provided by the selective service system but has been unable to obtain the classification to which he feels he is lawfully entitled. He now seeks judicial review of his selective service classification, but is precluded from such review by 50 U. S. C. App. sec. 460 (b)(3) unless he responds either affirmatively or negatively to an order to report for induction and raises the question of his classification as a defense to the criminal action which will be brought against him. To force the appellant to undergo the severe risks inherent in a criminal prosecution in order to obtain judicial review of his classification is to preclude all effective judicial review.

CONCLUSION

Appellant submits that this appeal brings before the court substantial Federal questions which require plenary consideration, with briefs on the merits and oral argument, for their resolution.

Respectfully submitted,

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APPELLANT'S APPENDIX

DECISION
(Formal Parts Omitted)

Before Fairchild, circuit judge, Reynolds and Gordon, district judges.

GORDON, district judge. Notwithstanding the plaintiff's claim that he is a conscientious objector, his local selective service board ordered him to report for induction into the military service. In this civil action, the plaintiff challenges the constitutionality of sec. 460(b)(3) of Title 50 U. S. C. App. This section was enacted by Congress in June, 1967 and states in part as follows:

> "No judicial review shall be made of the classification or processing of any registrant by local boards, appeal boards, or the President, except as a defense to a criminal prosecution instituted under section 12 of this title,, after the registrant has responded either affirmatively or negatively to an order to report for induction, or for civilian work in the case of a registrant determined to be opposed to participation in war in any form: Provided, That such review shall go to the question of the jurisdiction herein reserved to local boards, appeal boards, and the President only when there is no basis in fact for the classification assigned to such registrant. * * * "

The local selective service board made its order on February 16, 1968; it directed Mr. Foran to report for induction on March 8, 1968. Prior to the latter date, the plaintiff sought review of his classification by commencing an action in the

district court for the eastern district of Wisconsin. Chief Judge Robert E. Tehan, who presided at the hearing in the previous action (Case No. 68-C-15), dismissed that case on February 19, 1968, and no appeal therefrom was taken by Mr. Foran.

All the members of this three-judge court are seriously troubled by the procedural aspects of the instant action since substantially the basic question raised in the present case was resolved adversely to Mr. Foran in the previous action. Notwithstanding the fact that the plaintiff's current action may be subject to the defense of res judicata, the court chooses to base its decision upon the merits, and thus will now consider the question of the plaintiff's claimed constitutional right to judicial review prior to his induction into military service.

The language of sec. 460(b)(3) is reasonably clear; it establishes that it was the intention of Congress to preclude the type of judicial review which Mr. Foran seeks in the case at bar. It is Mr. Foran's contention, however, that the statute is unconstitutional because it denies him due process of law. The plaintiff claims that in order to obtain judicial review, he must either suffer indictment or must violate his conscience and submit himself for induction. The plaintiff argues that these alternatives are so grossly unreasonable and unfair that they rise to the dignity of being an invasion of due process.

Judge Fairchild and the writer of this opinion, find no merit in the plaintiff's claim that there is an abuse of due process inherent in sec. 460(b)(3).

In Falbo v. U.S., 320 U.S. 549, at page 554, the question of a conscientious objector's right to judicial review of his classification prior to the time he actually reported for service was discussed. The court stated:

> "Even if there was, as the Petitioner argues, a constitutional requirement that judicial review must be available to test the validity of the decision of the local board, it is certain that Congress was not required to provide for judicial intervention before final acceptance of an individual for National Service."

The drafting of young men for military service is a difficult and often painful matter. The Congress has indeed set a thorny path before any young man who seeks to challenge his draft classification in a court of law. The timing of such review is a matter fairly within the discretion of the Congress. The statutory direction that such review may not be had until after indictment or induction presents the prospective draftee with an onerous choice, but it cannot be said to violate due process of law.

Understandably, Mr. Foran would rather have an advance judicial determination of the regularity of his classification, but the Congress has determined that in this situation he must bear the risk of establishing the error of his classification. As Mr. Justice Holmes said in Nash v. U.S., 229 U.S. 373, 377 (1913):

> "The law is full of instances where a man's fate depends on his estimating rightly, that is, as the jury subsequently estimates it,

> some matter of degree; if his judgment is wrong, not only may he incur a fine or a short imprisonment . . . he may incur the penalty of death."

The challenged section of the code is constitutional; it does not infringe on the plaintiff's right to due process. In making this determination, we are mindful that the supreme court of the United States has recently granted review in Oestereich v. Selective Service System Local Board No. 11, (36 LW 3437 - May 21, 1968). In that case, the court of appeals for the 10th circuit had previously ruled that prior judicial review was not available to Mr. Oestereich, who sought to challenge the reclassification which deprived him of a ministerial student exemption. 390 F. 2, 100 (10th Cir. 1968). We understand that the solicitor general of the United States supported the theory of judicial review in the Oestereich Case because it turned on the propriety of a board's rejecting a direction of the Congress. Mr. Foran, on the other hand, is seeking to challenge a determination which the Congress saw fit to leave within the judgment of the selective service boards, namely, whether one shall be classified as a conscientious objector.

We have been informed that after the foregoing opinion was prepared, but before issuance, Mr. Foran appeared at the induction station in Milwaukee in response to an order for induction and refused to submit to induction. These facts may render the case moot as now claimed by the government, but denied by plaintiff Foran.

Plaintiff Foran has also applied for an order restraining prosecution for refusal to submit to induction.

Without deciding whether or not the case has become moot, we dismiss upon the merits in accordance with the foregoing opinion and deny plaintiff's application for an order restraining prosecution.

Judge Reynolds dissents from the decision on the merits, but he agrees that the application for a restraining order should be denied.

Dated at Milwaukee, Wisconsin, this 4th day of October, 1968.

Thomas E. Fairchild

John W. Reynolds

Myron L. Gordon

In the Supreme Court of the United States

OCTOBER TERM, 1968

No. 870

JAMES MICHAEL FORAN, APPELLANT

v.

JOHN WEINHOFF, ET AL.

ON APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE EASTERN DISTRICT OF WISCONSIN

MOTION TO DISMISS OR AFFIRM

Pursuant to Rule 16 of the Rules of this Court, appellees move to dismiss this appeal or, alternatively, to affirm the judgment of the district court.

STATEMENT

Appellant originally brought an action in the district court against the members of his local draft board, seeking to enjoin his induction. He alleged that the denial of his application for a conscientious objector classification was based on a letter from the Department of Justice which "blatantly misquoted

and deliberately misconstrued the holding of *United States* vs. *Seeger*, 380 U.S. 163, 173 (1965)." [1] The court dismissed the action on the ground that pre-induction review of Selective Service classifications was precluded by Section 10(b)(3) of the Military Selective Service Act, 50 U.S.C. App. 460(b)(3). No appeal was taken.

Appellant then brought the present action, also against the members of his local draft board,[2] seeking a declaratory judgment that Section 10(b)(3) is unconstitutional and asking that "defendants be per-

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[1] The Department of Justice letter, attached to the complaint, contained the following passage, which was apparently the basis for appellant's allegation:

> [The registrant] told the Hearing Officer that he is an atheist and that he had stopped believing that there is a God. Section 6(j) of the Universal Military Training and Service Act, as amended, makes no provision for the exemption of atheists from military training and service. This "section excludes those persons who, disavowing religious belief, decide on the basis of essentially political, sociological or economic consideration that war is wrong and that they will have no part of it." *United States* v. *Seeger*, 380 U.S. 163, 173 (1965). At page 186 the court said, *inter alia*:
>
> > "The use by Congress of the words 'merely personal' seems to us to restrict the exception to a moral code which is not only personal but which is the sole basis for the registrant's ~~brief and is in no way~~ *relative to a Supreme Being.*"
>
> This registrant is an avowed atheist and does not appear to meet the requirements for exemption as a conscientious objector under Section 6(j) of the UMTSA, as amended.

[2] Judge Tehan, who had dismissed the first action, was also named as a defendant; but he was subsequently dropped by agreement of the parties.

manently enjoined from denying to the plaintiff his right to judicial review on the basis of said unconstitutional Act of Congress." A three-judge court was convened. The court stated that it was "seriously troubled by the procedural aspects of the instant action since substantially the basic question raised in the present case was resolved adversely to Mr. Foran in the previous action." (J.S. 10). The court, nevertheless, reached the merits, holding that Section 10(b)(3) is constitutional as applied to this registrant.

Appellant's induction order became effective, and on June 12, 1968, he refused to submit to induction. On September 11, 1968, he was indicted for violation of 50 U.S.C. App. 462(a). He pleaded not guilty, and is now awaiting trial.

ARGUMENT

1. At the outset we note that while appellant cast his second action in terms of a request to enjoin the members of the board from asserting Section 10(b)(3) as a defense to his attempt to obtain judicial review, in actuality his action was to enjoin his induction rather than to enjoin enforcement of a federal statute. The validity of Section 10(b)(3) was merely drawn in question in order to meet the board's defense to appellant's action. In this situation it appears that a three judge court was not required to hear appellant's case and thus, a direct appeal to this court is not authorized. See *International Ladies' Garment Workers' Union* v. *Donnelly Garment Co.*, 304 U.S. 243.

2. Appellant's action clearly fails on the grounds of *res judicata* and mootness. In a previous action against the members of his draft board—who are the only appellees here—appellant unsuccessfully sought judicial review of his classification. This action was dismissed on the basis of Section 10(b)(3), and no appeal was taken. Appellant cannot now avoid the operation of *res judicata* by seeking to enjoin appellees from asserting the defense which they have already successfully utilized in defeating his prior action.

The action is now moot by reason of appellant's failure to submit to induction and the ensuing prosecution. The only remaining defendants are the members of the local board, and they have no authority, and, therefore, cannot be directed, to terminate the prosecution.

3. On the merits, the only issue appellant raises is the constitutionality of Section 10(b)(3) when applied to pre-induction judicial review of conscientious objector claims. In *Clark* v. *Gabriel*, No. 572, this Term, decided December 16, 1968, this Court held that Section 10(b)(3) is constitutional in such application. *Gabriel* controls this case.

Moreover, since appellant has refused to submit to induction and now faces prosecution, the case falls within the "familiar rule that courts of equity do not ordinarily restrain criminal prosecutions" since the defenses, constitutional or otherwise, "may be determined as readily in the criminal case as in a suit for an injunction." *Douglas* v. *Jeannette*, 319 U.S. 157, 163.

CONCLUSION

For the foregoing reasons, this appeal should be dismissed or the decision of the district court should be affirmed.

Respectfully submitted.

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JANUARY 1969.

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SUPREME COURT OF THE UNITED STATES

October Term, 1968.

FORAN v. WEINHOFF ET AL.

APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE EASTERN DISTRICT OF WISCONSIN.

No. 870. Decided February 24, 1969.

PER CURIAM.

The motion to dismiss is granted and the appeal is dismissed.

MR. JUSTICE DOUGLAS is of the opinion that probable jurisdiction should be noted.